SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ARTHUR DECARLO, JR, Personal Representative on behalf of the Estate of his father, ARTHUR DECARLO, SR. in his individual capacity, and on behalf of his father's heirs and next of kin,

Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,

Defendant.

Index No. 161644/2015
Motion Sequence No. 001

Hon. Manuel J. Mendez

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW OF DEFENDANT NATIONAL FOOTBALL LEAGUE IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

Brad S. Karp
Bruce Birenboim
Lynn B. Bayard
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Attorneys for Defendant National Football League
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Defendant, National Football League ("NFL"), respectfully submits this memorandum of law in support of its motion to dismiss Plaintiff's Complaint in its entirety pursuant to C.P.L.R. § 3211(a)(5),(7).

PRELIMINARY STATEMENT

Plaintiff's Complaint—based primarily on conduct alleged to have occurred in the *1950s*—is long time-barred. In addition, Plaintiff's causes of action for fraud and fraudulent concealment, negligent misrepresentation, negligent hiring and retention, conspiracy and wrongful death/survival fall far short of the requisite pleading standards. Thus, the Complaint should be dismissed in its entirety.

Plaintiff is the Personal Representative of the Estate of Arthur DeCarlo, Sr., who played football in the NFL from 1953 to 1961 and passed away in 2013 at age 82. Now, more than *five decades* after DeCarlo's retirement from the NFL, Plaintiff contends—through a kitchen-sink pleading—that the NFL somehow is liable for neurological injuries DeCarlo suffered as the result of repetitive head trauma sustained during his professional football career. None of Plaintiff's causes of action, however, states a viable claim for relief.

As an initial matter, the Complaint makes clear that each of Plaintiff's causes of action is barred by the applicable statute of limitations—three years from accrual of the negligence-based causes of action, and two or six years (depending on circumstances) from accrual of the fraud-based causes of action. Here, Plaintiff alleges that DeCarlo suffered brain injury as the result of alleged NFL conduct during DeCarlo's 1950s playing career—specifically, the alleged failure to enact particular player-safety measures in purported breach of duties owed to DeCarlo, and the alleged concealment (through misrepresentations and omissions) of the risk

of long-term brain damage and cognitive decline from repetitive head trauma and concussions suffered while playing football. These causes of action thus expired over a half-century ago.

Even if Plaintiff could argue that his causes of action are based upon DeCarlo's cognitive injury that manifested after retirement, and thus DeCarlo "discovered" his claims later on in life and had longer to assert them, the Complaint confirms the untimeliness of the causes of action under that theory, too. To that end, Plaintiff alleges that DeCarlo experienced symptoms in the form of "extreme headaches, episodic memory loss, repetition of stories, and mild confusion" by *1993*, sought and received medical attention for these purportedly "CTE-related symptoms" between *1995 and 2005*, and was diagnosed in *2005* with having "significant atrophy and ventricular enlargement" in his brain as "secondary to repeated injury [Mr. DeCarlo] received as a professional football player." (Compl. ¶¶ 76, 78-81, 90.) In other words, DeCarlo experienced, and discovered, his brain injury purportedly caused by NFL football by 2005 at the latest, yet failed to file a lawsuit until 2013, which was well past any applicable statute of limitations, whether based on discovery or otherwise.

Beyond being time-barred, Plaintiff's pleading is fatally deficient.

First, Plaintiff fails to allege—let alone with the requisite specificity—the essential elements of fraud, whether based on a purported misrepresentation or concealment. The Complaint fails to plead that the NFL made any specific representation, false or otherwise, during DeCarlo's NFL career, let alone identify (as it must) the representation at issue. Nor does the Complaint plead anything other than conclusory allegations of concealment during DeCarlo's NFL career. Plaintiff also does not allege with particularity that DeCarlo justifiably relied on any alleged statement or omission, that such misrepresentation or omission caused DeCarlo's alleged brain injury, or that the NFL acted with an intent to mislead DeCarlo into reliance.

Finally, to the extent that Plaintiff resorts to alleging misrepresentations and omissions allegedly occurring *after* DeCarlo's NFL career, such misrepresentations or omissions cannot form the basis of the fraud-based causes of action because Plaintiff has not sufficiently alleged how DeCarlo relied on them to his detriment, and as a matter of law, he waived the right to justifiably rely on any such misrepresentations made after 2005 when he learned of his brain injury purportedly caused by NFL football. For the same reasons, Plaintiff's allegations do not state a cause of action for negligent misrepresentation.

Second, Plaintiff fails to allege the elements of a cause of action for either negligent hiring or retention. As an initial matter, Plaintiff fails to plead—as he must—the identity of the specific MTBI Committee members purportedly employed by the NFL on which the cause of action is predicated. Nor does the Complaint allege that the NFL knew or should have known of any alleged employee's propensity for the sort of conduct complained of here. Moreover, Plaintiff does not sufficiently allege how the purported hiring and retention of MTBI Committee members—decades *after* DeCarlo retired from the NFL—caused him harm, or the necessary element that an employee was acting "outside the scope of employment."

Third, Plaintiff's cause of action for civil conspiracy lacks the central element of such a cause of action: That two or more people agreed to commit an unlawful act. Plaintiff fails to allege—much less offer concrete factual allegations demonstrating—an agreement in furtherance of an unlawful act involving the NFL or that the NFL acted with malice, as required under the law. Moreover, conspiracy is not actionable absent allegations of a separate, intentional tort, and here, Plaintiff's fraudulent concealment cause of action, on which the conspiracy cause of action is based, is deficiently pled.

Finally, because none of the substantive causes of action was timely at the time of DeCarlo's death, Plaintiff's cause of action for wrongful death/survival should also be dismissed.

In sum, the Complaint should be dismissed in its entirety and with prejudice.

STATEMENT OF FACTS[1]

The NFL is an unincorporated association of 32 Member Clubs that promotes, organizes, and regulates the sport of professional football in the United States. *See Stringer* v. *Nat'l Football League*, 474 F. Supp. 2d 894, 898 (S.D. Ohio 2007). Plaintiff is the Personal Representative of the Estate of Arthur DeCarlo, Sr. ("DeCarlo") and is a citizen of Alabama. (Compl. ¶ 12.) DeCarlo played football in the NFL—over *six decades* ago—from 1953 to 1961, and died in 2013 at age 82. (*Id.* ¶¶ 1, 14, 69.)

Plaintiff alleges that "[b]etween 1933 and 1968, the NFL voluntarily assumed . . . a duty to supervise how the game of football was played in the United States," and in doing so, purportedly assumed a "duty to inform and advise players and teams of foreseeable harm in the form of head and neck injuries," including "the risks of short- and long-term neurocognitive disabilities and deficits to athletes exposed to [Mild Traumatic Brain Injury ('MTBI')]." (*Id.* ¶¶ 104-06.) Plaintiff alleges that the NFL "knew or should have known of the health risks associated with concussive and sub-concussive blows" to the head because of publicly available "medical scholarship link[ing] exposure to repeat head trauma with long-term neurological injury" and general "awareness elsewhere in the sports world." (*Id.* ¶¶ 20, 46.) Although Plaintiff recognizes generally that the NFL "issued regulations to warn players of the hazardous nature of continuing to apply hazardous tackling techniques" (*id*. ¶ 35), Plaintiff nonetheless alleges that the NFL failed to ensure DeCarlo's safety by, among other things, not

[1] This summary is based on the allegations of the Complaint, the factual averments of which the NFL denies but assumes to be true for purposes of this motion only.

"promulgat[ing] rules and regulations to adequately address the dangers of repeated concussions and returning to play." (*Id*. ¶ 112.)

Plaintiff further claims that through misrepresentations and omissions—both during and after DeCarlo's career—the NFL "actively concealed the information that progressive long-term neurological injuries could result from repetitive head-trauma suffered while playing football." (*Id.* ¶ 5.) Plaintiff alleges, with no supporting allegations, that the NFL purportedly misrepresented "that present NFL players were not at an increased risk of short-term and long-term adverse consequences if they returned too soon to NFL games or practices after suffering head trauma." (*Id.* ¶ 125.) Plaintiff also alleges that the NFL negligently hired and retained members of the MTBI Committee—which Plaintiff asserts was a "purportedly independent entity" formed decades after DeCarlo retired from NFL football to engage in "good-faith concussion/head-trauma research." (*Id*. ¶¶ 53-55, 133, 141.) Plaintiff further contends that the MTBI Committee and the NFL somehow conspired "to discount and reject" the connection between concussions suffered while playing in the NFL, return-to-play therefrom, and the long-term effects. (*Id*. ¶¶ 100, 125.)

Plaintiff also alleges—again, with no supporting specifics—that DeCarlo "reasonably relied on the NFL's actions, statements, policies, and omissions on the subject, to his detriment." (*Id*. ¶ 111; *see also id*. ¶ 88.) As a purported result of these actions, Plaintiff claims that DeCarlo suffered neurological injuries resulting from repetitive head trauma during his NFL career, was unaware of the "cause, extent, and true nature" of his brain injury, and "did not take protective measures or seek the diagnosis and treatment he would have otherwise sought had he been informed of the truth." (*Id*. ¶¶ 1, 5 90, 98.) Nonetheless, Plaintiff admits that DeCarlo suffered his "sub-concussive and concussive exposures" during his career from 1953 to 1961 and

that the purportedly neurocognitive symptoms allegedly associated with DeCarlo's brain injury (including "extreme headaches, episodic memory loss, repetition of stories, and mild confusion") "began to appear at least 20 years prior to his death." (*Id.* ¶¶ 76, 123.) As a result of these purportedly "CTE-related symptoms," DeCarlo sought medical attention and treatment for his neurocognitive impairment on several occasions: In 1995, he sought medical attention for headaches; in 2003, he visited physicians about "fading memory" and received medication for treatment; and in July 2005, he purportedly was told by the Director of the Neuropsychiatry Program at Sheppard Pratt Hospital that he found in DeCarlo's brain "significant atrophy and ventricular enlargement as 'secondary to repeated injury [Mr. DeCarlo] received as a professional football player.'" (*Id*. ¶¶ 78-81, 90.) DeCarlo followed up on this medical diagnosis by visiting a different hospital to rule out alternative causes for his dementia. (*Id*. ¶ 82 ("In October 2005, John Hopkins Medicine noted that it had found no evidence of any hydrocephalus and ruled it out as a possible cause for Mr. DeCarlo's dementia.").) Over eight years later, on December 21, 2013, Plaintiff alleges that DeCarlo died "due to complications from his dementia," and upon death was diagnosed pathologically with Alzheimer's disease and Chronic Traumatic Encephalopathy ("CTE")—a "neurological illness" purportedly "resulting from concussions due to repetitive head-trauma suffered during his career as a professional football player for the NFL from 1953 to 1961." (*Id*. ¶¶ 1, 2, 83.)

Plaintiff asserts causes of action against the NFL for fraudulent concealment and fraud (Counts I and II), civil conspiracy (Count III), negligence (Counts IV and V), negligent misrepresentation (Count VI, mislabeled as Count VII), negligent hiring and retention (Counts VII and VIII, mislabeled as Counts VIII and IX), and wrongful death/survival (Count IX, mislabeled as Count VII). (*Id*. ¶¶ 85-146.) Plaintiff seeks compensatory damages, punitive,

exemplary and statutory damages (as applicable), and an award of attorneys' fees and costs. (*Id.*, Prayer for Relief.)

For the reasons set forth below, Plaintiff's causes of action should be dismissed.

ARGUMENT

All of Plaintiff's causes of action are time-barred or suffer fatal pleading deficiencies.

I. PLAINTIFF'S PERSONAL INJURY CAUSES OF ACTION ARE TIME-BARRED

A. Plaintiff's Negligence Causes of Action Are Time-Barred

Absent special circumstances inapplicable here, the statute of limitations for negligence causes of action resulting in personal injury is three years. *See* C.P.L.R. § 214(5). The cause of action accrues "when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court."[2] *Blanco* v. *Am. Tel. & Tel. Co*., 90 N.Y.2d 757, 767 (1997). In other words, a negligence cause of action accrues at the time of injury proximately resulting from the breach of a duty owed by a defendant to plaintiff. *See Friedman* v. *Anderson*, 23 A.D.3d 163, 164 (1st Dep't 2005); *Torres* v. *Greyhound Bus Lines, Inc.*, 48 A.D.3d 1264, 1265 (4th Dep't 2008) ("As a rule, the date of injury is the benchmark for determining the accrual of a cause of action" (quoting *Blanco*, 90 N.Y.2d at 767)); *Piper* v. *Int'l Bus. Machs. Corp*., 219 A.D.2d 56, 60 (4th Dep't 1996) (holding that "injury to plaintiff is not

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[2] New York regards statutes of limitations as procedural for choice of law purposes and therefore applies New York statutes of limitations unless a nonresident plaintiff with a cause of action accruing outside of New York seeks a more favorable statute of limitations by suing in New York, in which case New York courts will apply the foreign statute of limitations if it is shorter. C.P.L.R. § 202; *Martin* v. *Julius Dierck Equip. Co.*, 43 N.Y.2d 583, 588 (1978). Given that all of Plaintiff's causes of action are barred by the applicable New York statutes of limitations, the NFL argues only under New York law. If this Court were to find that New York law does not bar a given cause of action as untimely, the NFL reserves the right to argue under C.P.L.R. § 202 that Plaintiff's cause of action accrued outside of New York and that such cause of action is untimely under any shorter limitations period of that state.

identical to the occupational disease for which she seeks compensation" because "[d]isease is a consequence of injury, not the injury itself"). New York law is settled that the cause of action accrues even if plaintiff is unaware that he has a cause of action at the time of injury because the injury puts plaintiff on inquiry notice and charges him with responsibility for investigating, within the limitations period, all potential causes of action against all potential defendants. *Woodlaurel, Inc*. v. *Wittman*, 199 A.D.2d 497, 498 (2d Dep't 1993); *Schiffman* v. *Hosp. for Joint Diseases*, 36 A.D.2d 31, 34-35 (2d Dep't 1971) (dismissing plaintiff's medical malpractice cause of action as time-barred because plaintiff's cause of action accrued when misread biopsy slides were available to plaintiff, not when the error was later discovered).

Here, the Complaint makes clear that the negligence causes of action accrued and became time-barred long before Plaintiff filed the Complaint. Plaintiff pleads that the NFL purportedly assumed a duty "[b]etween 1933 and 1968" to supervise how the game of football was played, and purportedly breached that duty during DeCarlo's career from 1953 to 1961 by, among other things, not ensuring DeCarlo's safety by "promulgat[ing] rules and regulations to adequately address the dangers of repeated concussions" and return-to-play, and failing to disclose "the special risks of long-term complications from repeated concussions and returning to play," thereby "resulting in [his] long-term neurocognitive problems and disabilities" from injuries—specifically, injuries "occurr[ing] when he was exposed to repetitive sub-concussive and concussive exposures" during his playing career. (Compl. ¶¶ 104, 110, 112, 115-16, 123.) Thus, Plaintiffs' two negligence causes of action accrued over a half-century ago and are clearly time-barred.

Plaintiff's negligence causes of action are *still* time-barred even if Plaintiff argues that DeCarlo's purported brain injury manifested after he retired from NFL football. Here,

Plaintiff alleges in the Complaint that the symptoms purportedly associated with DeCarlo's alleged brain injury "began to appear at least 20 years prior to his death"—in other words, by 1993—in the form of neurocognitive impairment, including "extreme headaches, episodic memory loss, repetition of stories, and mild confusion." (*Id*. ¶ 76.) Moreover, DeCarlo visited physicians about "fading memory" by 2003 and, by 2005, had received a specific diagnosis of dementia as "secondary to repeated injury [Mr. DeCarlo] received as a professional football player." (*Id*. ¶¶ 80-82.) Thus, Plaintiff's causes of action for negligence accrued by 2005 (and likely, far earlier) when DeCarlo discovered that NFL Football purportedly caused his brain injury, and in turn became time-barred three years later in 2008—seven years prior to the filing of the Complaint.

Plaintiff's negligence causes of action should therefore be dismissed with prejudice. *See, e.g.*, *Robertson* v. *Wells*, 95 A.D.3d 862, 864 (2d Dep't 2012) (ordering dismissal of negligence cause of action as time-barred).

B. Plaintiff's Negligent Hiring and Retention Causes of Action Are Time-Barred

Plaintiff's negligent hiring and retention causes of action are barred by the same three-year statute of limitations. *See Bouchard* v. *N.Y. Archdiocese*, 2006 WL 3025883, at *2 (S.D.N.Y. Oct. 24, 2006) (holding "[t]he applicable statute of limitations for a negligent hiring or supervision claim is three years" (citing C.P.L.R. § 214(5))); *Schrank* v. *Lederman*, 52 A.D.3d 494, 496 (2d Dep't 2008) (same). Such a claim accrues when misconduct occurs that results in injury. *See Zimmerman* v. *Poly Prep Country Day Sch.*, 888 F. Supp. 2d 317, 337 (E.D.N.Y. 2012).

Plaintiff alleges that the NFL's purported negligent hiring and retention of MTBI Committee members resulted in the misleading of DeCarlo "regarding the risks associated with

repetitive head impacts in the game of football," which led to his suffering "brain injuries" and "not tak[ing] protective measures or seek[ing] the diagnosis and treatment he would have otherwise sought had he been informed of the truth." (Compl. ¶¶ 133-34, 142.) Thus, Plaintiff alleges misconduct that somehow resulted in his brain injury suffered during his playing career from 1953 to 1961 (*id*. ¶ 1), or that resulted in his postponing his efforts to be diagnosed and treated (*id*. ¶¶ 134, 142), which the Complaint concedes that he ultimately accomplished between 1995 and 2005 when he sought and received diagnosis and treatment for his neurocognitive impairment (*id.* ¶¶ 79-82). In either circumstance, the injury to DeCarlo—and his discovery of that injury—necessarily occurred by 2005. As a result, his cause of action for negligent hiring and retention accrued by 2005 and expired by 2008, at the latest. Thus, these causes of action should be dismissed with prejudice.

C. Plaintiff's Fraud, Fraudulent Concealment and Negligent Misrepresentation Causes of Action Are Time-Barred

Timely causes of action based in fraud must be brought within the greater of six years following the commission of the fraud, or two years from the time the plaintiff allegedly discovered the fraud, or could with reasonable diligence have discovered it. C.P.L.R. § 213(8); *Coleman* v. *Wells Fargo & Co.*, 125 A.D.3d 716, 716 (2d Dep't 2015) ("A cause of action based upon fraud accrues, for statute of limitations purposes, at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence." (internal quotation marks omitted)). Certain New York courts apply this same limitations period for negligent misrepresentation causes of action.[3] *See, e.g.*, *Abrams* v. *Life Med. Techs., Inc.*,

[3] Although other New York courts hold that the statute of limitations for a negligent misrepresentation cause of action is three years, for the purposes of this motion only, and with reservation of rights to argue otherwise in the future, the NFL assumes the application of the longer six-year statute of limitations because Plaintiff's cause of action is untimely under either length statute. *See, e.g.*, *Valentini* v. *Citigroup, Inc.*, 837 F. Supp. 2d 304, 329

2015 WL 5724801, at *7 (S.D.N.Y. Sept. 29, 2015). Where the alleged wrongful conduct occurred more than six years prior to the filing of litigation, the burden of establishing that the fraud could not have been discovered before the two-year period prior to the commencement of litigation rests on the plaintiff who seeks the benefit of the exception. *Brooks* v. *AXA Advisors, LLC*, 104 A.D.3d 1178, 1180 (4th Dep't 2013); *Lefkowitz* v. *Appelbaum*, 258 A.D.2d 563, 563 (2d Dep't 1999) (same).

Here, Plaintiff alleges that, through misrepresentations and omissions, the NFL "actively concealed the information that progressive long-term neurological injuries could result from repetitive head-trauma suffered while playing football," including "long-term brain damage and cognitive decline." (Compl. ¶¶ 5, 46; *see also id*. ¶¶ 87, 95, 125.) To the extent that fraud is alleged to have occurred during DeCarlo's career—*i.e.*, between 1953 and 1961—nearly fifty years have passed since the limitations period would have expired: At the latest, 1967. (*See*, *e.g.*, *id*. ¶¶ 87, 97, 121.) Indeed, Plaintiff's own allegations claim that there was a wealth of publicly-available "medical scholarship link[ing] exposure to repeat head trauma with long-term neurological injury" that was published both before and during Mr. DeCarlo's playing career—*i.e*., over 50 years ago, allowing him to reasonably discover the alleged fraud at the time and assert his causes of action. (*Id*. ¶ 20; *see also id*. ¶¶ 21-27 (citing scholarship).)

But even if Plaintiff argues that DeCarlo did not, and reasonably could not, discover the alleged fraud until his later-in-life diagnosis of brain injury, that injury was diagnosed, at the latest, in 2005—including dementia as "secondary to repeated injury [Mr. DeCarlo] received as a professional football player"—putting him on clear notice at the time of the NFL's alleged wrongful concealment of the potential connection between football and long-

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(S.D.N.Y. 2011) (applying three-year limitations period); *Country World, Inc.* v. *Imperial Frozen Foods Co.*, 186 A.D.2d 781, 782 (2d Dep't 1992) (same).

term brain injury. (*Id*. ¶ 81.) In other words, *based on the very facts alleged in the Complaint*, Plaintiff could have discovered the alleged fraud with reasonable diligence within two years of the 2005 diagnosis, if not long earlier. Thus, the fraud, fraudulent concealment and negligent misrepresentation causes of action expired, at the latest, two years later in 2007.

Because the instant suit was not filed until 2015, Plaintiff's causes of action should be dismissed with prejudice as untimely. *See Coleman*, 125 A.D.3d at 717 (affirming dismissal of fraud cause of action as time-barred because "plaintiffs possessed knowledge of facts from which they could have discovered" fraud more than six years before they filed suit); *Brooks*, 104 A.D.3d at 1180 (same, where plaintiffs "reasonably could have discovered the alleged fraud . . . more than two years prior to the commencement of the action"); *Espie* v. *Murphy*, 35 A.D.3d 346, 348 (2d Dep't 2006) (affirming grant of motion to dismiss fraud and negligent misrepresentation causes of action as time-barred because plaintiffs were made aware of facts from which they could reasonably infer the existence of the alleged fraud nine years before they filed suit).

D. Plaintiff's Conspiracy Cause of Action Is Time-Barred

Plaintiff's cause of action for civil conspiracy is similarly out of time. The statute of limitations for conspiracy is that of the underlying tort. *Schlotthauer* v. *Sanders*, 153 A.D.2d 731, 732 (2d Dep't 1989) (dismissing conspiracy cause of action as "time barred because conspiracy is not an independent tort, and is time barred when the substantive tort underlying it is time barred"); *Williams* v. *Arpie*, 56 A.D.2d 689, 690 (3d Dep't 1977), *aff'd*, 44 N.Y.2d 689 (1978) (same). Here, Plaintiff's cause of action for conspiracy is based on the NFL's purported fraudulent concealment that progressive long-term neurological injuries could result from repetitive head trauma suffered while playing football. (Compl. ¶ 100.) Therefore, for the reasons set forth above, the conspiracy cause of action is likewise time-barred.

II. PLAINTIFF'S CAUSES OF ACTION ARE FATALLY FLAWED[4]

A. Plaintiff Fails to State a Cause of Action for Fraud or Fraudulent Concealment

Plaintiff does not adequately allege a cause of action for fraud, whether founded on an alleged misrepresentation (Count II—Fraud) or an omission (Count I—Fraudulent Concealment).

To plead a cause of action for fraud, plaintiff must allege a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by plaintiff and resulting injury. *Monaco* v. *N.Y. Univ. Med. Ctr.*, 213 A.D.2d 167, 169 (1st Dep't 1995); *see also Presbyterian Med. Ctr.* v. *Budd*, 832 A.2d 1066, 1072 (Pa. Super. Ct. 2003) (setting forth elements under Pennsylvania law); *EGW Partners, L.P.* v. *Prudential Ins. Co. of Am.*, 2001 WL 1807416, at *5 (Pa. Ct. Com. Pl. June 22, 2001) (noting that "Pennsylvania and New York require proof of

[4] Although Plaintiff does not allege under which state laws his causes of action arise (other than for wrongful death/survival which he purports to bring under Pennsylvania law), the elements of the causes of action are substantially similar across the various states and the Court need not conduct a choice of law analysis at this stage. *See* 57A Am. Jur. 2d. Negl. § 71 (2015) (listing negligence elements and citing cases from numerous jurisdictions); 27 Am. Jur. 2d. Emp. Relationship §§ 372, 374 (2015) (negligent hiring and retention); 37 C.J.S. Fraud § 12 (2015) (fraudulent misrepresentation); 37 C.J.S. Fraud § 28 (2015) (fraudulent concealment); 37 Am. Jur. 2d. Fraud and Deceit § 29 (2015) (negligent misrepresentation); 16 Am. Jur. 2d. Conspiracy § 51 (2015) (conspiracy). While the NFL cites to New York law—because it is the forum state and because Plaintiff alleges that "throughout the period of the concealment-fraud alleged . . . the NFL's headquarters have been based in New York, NY, and therefore, a substantial portion of the events and/or omissions giving rise to the claims emanated from activities within this jurisdiction . . . ." (Compl. ¶ 11)—and Pennsylvania law—because Plaintiff asserts, inconsistent with the statement above, that "[t]hroughout decedent DeCarlo's career, the NFL maintained its headquarters and offices in Pennsylvania," making it "the center of gravity for rule-making, player-safety failures and the alleged acts of negligence leading to the decedent's on-field injuries." (*id.* ¶ 17)—the NFL does not concede at this time that New York or Pennsylvania law governs any of Plaintiff's causes of action or that the NFL is restricted only to those defenses available under New York or Pennsylvania law.

substantially identical elements for fraudulent misrepresentation"). A cause of action for fraudulent concealment requires the same elements, except that the complaint must allege that the defendant intentionally concealed a material fact rather than made an affirmative misrepresentation. *See FNF Touring LLC* v. *Transform Am. Corp.*, 111 A.D.3d 401, 401-02 (1st Dep't 2013); *Bortz* v. *Noon*, 729 A.2d 555, 560 (Pa. 1999) (same). Moreover, the complaint must also allege that the defendant had "a duty to speak," as "mere silence is not sufficient." *Wilson* v. *Donegal Mut. Ins. Co.*, 598 A.2d 1310, 1316 (Pa. Super. Ct. 1991); *FNF Touring*, 111 A.D.3d at 402 ("Absent a confidential or fiduciary relationship, there is no duty to disclose, and [a defendant's] mere silence, without identifying some act of deception, does not constitute a concealment actionable as fraud." (internal quotation marks omitted)).

Both fraud and fraudulent concealment must be pled with particularity. *See* C.P.L.R. § 3016(b); Pa.R.C.P. § 1019(b); *Mandarin Trading Ltd*. v. *Wildenstein*, 16 N.Y.3d 173, 178 (2011); *Muhammad* v. *Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346, 1352 (Pa. 1991); *Presbyterian Med.*, 832 A.2d at 1072. Thus, the Complaint must allege "specific misrepresentations, who made such misrepresentations, and when they were made," as well as all other "circumstances constituting the alleged wrong." *Daly* v. *Kochanowicz*, 67 A.D.3d 78, 90 (2d Dep't 2009); *see also Commonwealth ex rel. Pappert* v. *TAP Pharm. Prods., Inc.*, 868 A.2d 624, 636 (Pa. Commw. Ct. 2005) (requiring that plaintiff allege the "precise acts the Defendants took").

Plaintiff's pleading falls far short.

First, the Complaint does not allege *any* specific false representation that the NFL made before or during DeCarlo's NFL playing career from 1953-1961,[5] let alone who made the statement, when he or she did so, and how the purportedly false information was communicated. Plaintiff's fraudulent concealment cause of action suffers from the same deficiency: The Complaint lacks any factual allegations regarding the purported concealment during DeCarlo's playing career, including who at the NFL was responsible. As a result, Plaintiff has failed to state a cause of action for fraud or fraudulent concealment that purportedly caused his "repetitive head trauma suffered during his career as a professional football player." (Compl. ¶ 1.)[6]

Second, Plaintiff fails to plead with particularity that DeCarlo justifiably relied on any statements (or omissions) allegedly made by the NFL. Rather, Plaintiff again merely offers a conclusory boilerplate allegation: That "[a]s a result of the NFL's misconduct," DeCarlo "suffered brain injuries that were progressive and latent and did not take protective measures or seek the diagnosis and treatment he would have otherwise sought had he been informed of the truth." (Compl. ¶ 98; *see also* ¶¶ 88, 111 (alleging with regard to negligence cause of action

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[5] The Complaint alleges that DeCarlo's injuries "occurred when he was exposed to repetitive sub-concussive and concussive exposures"—in other words, during his NFL career from 1953 to 1961. (Compl. ¶ 123.)

[6] *See Gregor* v. *Rossi*, 120 A.D.3d 447, 447 (1st Dep't 2014) (fraud not pled with requisite particularity "because the words used by defendants and the date of the alleged false representation are not set forth"); *Riverbay Corp*. v. *Thyssenkrupp N. Elevator Corp.*, 116 A.D.3d 487, 488 (1st Dep't 2014) (affirming dismissal where fraud cause of action "failed to allege specific facts with respect to the time, place, or manner in which [defendants] made the purported representations"); *Brown* v. *Wolf Grp. Integrated Commc'ns, Ltd*., 23 A.D.3d 239, 239-40 (1st Dep't 2005) (fraud cause of action not pled with particularity when plaintiff alleged defendants "deliberately mispresented the fact that an agreement had been reached," but failed to specify "the words or actions used") (internal quotation marks omitted); *Eastman Kodak Co.* v. *Roopak Enters.*, 202 A.D.2d 220, 222 (1st Dep't 1994) (dismissing cause of action because it was neither alleged "the time nor the place of the purported misrepresentations nor which employee . . . purportedly made them"); *TAP Pharm. Prods.,* 868 A.2d at 636; *Presbyterian Med.*, 832 A.2d at 1073.

that he "reasonably relied on the NFL's actions, statements, policies, and omissions on the subject, to his detriment").) But "simply averring that Plaintiff justifiably relied on Defendant's misrepresentation is not enough to comply with the specificity requirements of pleading fraud." *Premium Assignment Corp.* v. *City Cab Co., Inc.*, 2005 WL 1706976, at *1 (Pa. Ct. Com. Pl. July 15, 2005) (dismissing fraud cause of action for failure to specify particular facts supporting justifiable reliance claim) (internal quotation marks omitted). Plaintiff does not allege, with particularity or otherwise, that DeCarlo read or heard any specific statements made by the NFL. Nor does Plaintiff allege (as he must) how DeCarlo specifically "changed [his] position or otherwise relied upon any purported misrepresentations or omissions to [his] detriment." *Waggoner* v. *Caruso*, 68 A.D.3d 1, 6 (1st Dep't 2009), *aff'd* 14 N.Y.3d 874 (2010) (affirming dismissal of fraud cause of action for failure to allege sufficient detail). The Complaint does not specify what "protective measures" (Compl. ¶ 98) DeCarlo otherwise would have taken, or when he would have sought diagnosis and treatment in a manner that would have prevented his injuries.[7]

Third, Plaintiff does not allege with particularity how the NFL's purported misrepresentations and omissions caused DeCarlo's injuries. Here, the Complaint again offers only boilerplate allegations: That the fraudulent conduct "delayed his ability to plan for the future of himself and his family and to seek appropriate treatment for his latent neurodegenerative conditions," and that it "substantially increased DeCarlo's pain and suffering once his disease manifested, because he could not act most effectively to mitigate his

[7] *See Tuosto* v. *Philip Morris USA Inc.*, 2007 WL 2398507, at *9 (S.D.N.Y. Aug. 21, 2007) (allegation that defendant issued false advertisement did "not prove reliance" when the "Complaint does not allege that [plaintiff] saw this advertisement"); *N.Y. State Elec. & Gas Corp.* v. *Westinghouse Elec. Corp.*, 564 A.2d 919, 927-28 (Pa. Super. Ct. 1989) (allegation that plaintiff acted "as a result" of defendant's advice did not plead justifiable reliance); *Premium Assignment*, 2005 WL 1706976, at *1.

symptoms." (Compl. ¶ 88; *see also id*. ¶ 98.) This is not a sufficient pleading of causation, let alone with the particularity required, because Plaintiff does not allege *how* DeCarlo was injured when he was purportedly delayed in planning for the future, or *how* an injury resulted by not acting most effectively, or *how* he was injured by not acting differently.[8]

Fourth, as for the requirement that any alleged misrepresentation or omission was made with the intent of misleading DeCarlo into relying on it, this element, too, is alleged only in a conclusory fashion. (*See, e.g.*, Compl. ¶ 56 (the NFL "used it [sic] information generated by the MTBI committee to purposely misrepresent and/or conceal medical evidence on that issue"), ¶ 87 ("The NFL knowingly concealed facts and information and/or made continuing misrepresentations of material fact with the intent to deceive and defraud . . . .").) It is not sufficient, however, to "ascribe the acts of the defendant . . . to evil motive with an attempt to deceive and mislead." *Muhammad*, 587 A.2d at 1352 (internal quotation marks omitted). Rather, "[u]nless the plaintiff can more fully describe what facts support the [defendants'] evil motives," plaintiff's allegations will be considered "nothing more than unfounded accusations which have no apparent basis in fact." *Id.* (internal quotation marks omitted); *see also Giant Grp., Ltd.* v. *Arthur Anderson LLP*, 2 A.D.3d 189, 190 (1st Dep't 2003) ("[N]egligence claims cannot be deemed fraud solely because of the nomenclature used and conclusory allegations of fraud." (internal quotation marks omitted)). That is the case here.

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[8] *Tiberius Capital, LLC* v. *PetroSearch Energy Corp.*, 2011 WL 1334839, at *6, *9 (S.D.N.Y. Mar. 31, 2011) (dismissing claims when "Plaintiff repeatedly asserts that it relied on Defendants' misrepresentations, but it never alleges what action it would not have engaged in or forwent but for the misrepresentations"); *Gregor*, 120 A.D.3d at 448 ("The lack of specificity . . . renders any claim of the required loss causation conclusory."); *Waggoner*, 68 A.D.3d at 6 ("The required detail is . . . lacking with respect to causation because the complaint does not set forth how defendants' conduct caused plaintiffs [losses].").

Moreover, the Complaint sets forth facts that, when assumed as true, require dismissal of any fraud-based cause of action premised on reliance on statements or omissions made after July 2005, when DeCarlo was diagnosed with brain injury purportedly caused by playing football in the NFL. Under New York law, a plaintiff waives any fraud cause of action for damages arising from purported fraudulent conduct that occurs after plaintiff discovers defendant's previous representations on the subject were false. *Sanitoy, Inc.* v. *Shapiro*, 705 F. Supp. 152, 156-57 (S.D.N.Y. 1989) (holding plaintiffs could not justifiably rely on statements made by defendant about the quality of toys as truthful when plaintiffs had already discovered that they could not believe representations by the defendant about the quality of goods).[9] Any reliance by DeCarlo after July 2005 on statements or omissions by the NFL concerning whether progressive long-term neurological injuries could result from repetitive head trauma suffered while playing football would not be justifiable as a matter of law.

Accordingly, Plaintiff's deficiently pleaded causes of action for fraud and fraudulent concealment should be dismissed.

B. Plaintiff Fails to State a Cause of Action for Negligent Misrepresentation

Plaintiff's cause of action for negligent misrepresentation also fails. To state a cause of action for negligent misrepresentation, Plaintiff must demonstrate "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on

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[9] *See also Long Island Lighting Co*. v. *IMO Delaval, Inc.*, 668 F. Supp. 237, 240 (S.D.N.Y. 1987) (granting motion to dismiss fraudulent concealment claim where plaintiff knew or should have known about defects at issue in 1977 and alleged concealment occurred in 1983 because "any claim of subsequent concealment lacks the necessary element of *justifiable* reliance" because defendant "could not conceal what [plaintiff] should have long since known about and remedied"); *Oleet* v. *Pa. Exch. Bank*, 285 A.D.411, 414-15 (1st Dep't 1955) (dismissing fraud cause of action because plaintiffs waived it after discovering alleged misrepresentation in agreement with defendant and then extending terms with defendant).

the information." *MatlinPatterson ATA Holdings LLC* v. *Fed. Express Corp.*, 87 A.D.3d 836, 840 (1st Dep't 2011) (citing *JAO Acquisition Corp*. v. *Stavitsky*, 8 N.Y.3d 144, 148 (2007)); *see also Bortz* v. *Noon*, 729 A.2d 555, 561 (Pa. 1999) (setting forth elements of claim). A cause of action for negligent misrepresentation, like a cause of action for fraud, must be pled with particularity. *Ferro Fabricators, Inc*. v. *1807-1811 Park Ave. Dev. Corp*., 127 A.D.3d 479, 479 (1st Dep't 2015) (applying C.P.L.R. § 3016(b) to negligent misrepresentation causes of action).

Plaintiff's cause of action for negligent misrepresentation fails for many of the same reasons that the fraud causes of action fail. First, the Complaint does not set forth with particularity the purported misrepresentations at issue. For example, Plaintiff alleges vaguely in the specific negligent misrepresentation context that the NFL's "rules of play between 1953 and 1961" materially misrepresented the risks of exposure to repetitive sub-concussive and concussive blows. (Compl. ¶¶ 120-21.) Plaintiff does not, however, specify a single rule, let alone allege why the information contained in the rules was false. To the contrary, the Complaint alleges generally that the NFL "issued regulations to warn players of the hazardous nature of continuing to apply hazardous tacking techniques," including the risk of head injuries. (*Id*. ¶ 35.) Similarly, Plaintiff claims that additional misrepresentations by the "NFL" included "ongoing and baseless criticism of legitimate scientific studies that set forth the dangers and risks of head impacts which NFL players regularly sustained." (*Id*. ¶ 125; *see also* ¶¶ 47, 59, 63, 67-68.) But the Complaint never specifies which individual purportedly made these statements, when he or she did so, and how the purportedly false information was communicated. Such conclusory pleadings are insufficient as a matter of law and are subject to dismissal.[10]

[10] *See*, *e.g.*, *Ferro Fabricators*, 127 A.D.3d at 480 (affirming dismissal of negligent misrepresentation cause of action where the "complaint only contains general allegations as to the alleged misrepresentations and virtually no information as to when and by whom these

Second, Plaintiff does not plead sufficiently how DeCarlo justifiably relied on the purportedly negligent misrepresentations or how his injuries were caused by any such misrepresentations. (*See* Compl. ¶ 127.) For the reasons set forth above with respect to the fraud-based causes of action (*see supra* Section II.A), the Complaint is plainly insufficient.[11] Also as set forth above with regard to the fraud causes of action (*see supra* Section II.A), DeCarlo could not have justifiably relied on any purportedly negligent misrepresentations made after his 2005 diagnosis of brain injury purportedly caused by playing NFL football.[12]

C. Plaintiff Fails to State a Cause of Action for Negligent Hiring or Negligent Retention

Plaintiff's negligent hiring and retention causes of action—concerning MTBI Committee members (*see* Compl. ¶¶ 131, 137)—also are not alleged adequately.[13]

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misrepresentations were made"); *McHam* v. *Whitney*, 143 Misc. 2d 441, 445 (Sup. Ct. 1989) (dismissing negligent misrepresentation cause of action where "neither the name of the person making the representations, nor the manner in which they were made, is set forth in the pleading"); *see also Floyd* v. *Brown & Williamson Tobacco Corp*., 159 F. Supp. 2d 823, 834 (E.D. Pa. 2001) (granting motion to dismiss negligent misrepresentation claim that "contain[ed] no allegations whatsoever concerning specific negligent misrepresentations").

[11] *See*, *e.g*., *Water Street Leasehold LLC* v. *Deloitte & Touche LLP*, 19 A.D.3d 183, 185 (1st Dep't 2005) (stating that an "essential element" of a negligent misrepresentation cause of action is reasonable reliance to a party's detriment and that plaintiff must show both that "defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)" (internal quotation omitted); *Smith* v. *Lincoln Ben. Life Co.*, 395 F. App'x 821, 824 (3d Cir. 2010) (affirming dismissal of negligent misrepresentation claim under Pennsylvania law because the "complaint failed to state how [plaintiff] detrimentally relied upon or was injured by [the] alleged misrepresentation, specifically, how she failed to act to her detriment as a result of the communication.").

[12] *Cf Honeymoon Diamonds* v. *Int'l Jewelers Underwriters Agency Ltd*., 111 A.D.3d 460, 461 (1st Dep't 2013) (justifiable reliance could not be established based on statement that insurance policy was in effect at the time of loss and that there was coverage when that statement was made *after* the loss already occurred).

[13] The elements include, among others, that the alleged tortfeasor and defendant were in an employee-employer relationship, that the employer knew or should have known of the employee's propensity for the conduct that caused the injury, and (with regard to negligent

First, the Complaint does not even identify a specific alleged employee as the basis for the causes of action—instead referring only to "persons within" or "controlling members of" the MTBI Committee—an entity purportedly funded in 1994 to engage in good-faith concussion/head-trauma research. (*Id.* ¶¶ 53-55, 131, 137.) This pleading deficiency alone is grounds for dismissal. *See*, *e.g.*, *Sheila C.* v. *Povich*, 11 A.D.3d 120, 130 (1st Dep't 2004) (holding trial court erred in not dismissing negligent hiring and retention causes of action where Complaint was "devoid of . . . the identity of the employees involved").

Second, Plaintiff falls well short of pleading an "essential element" of these causes of action: "[T]hat the employer knew, or should have known, of the employee's propensity for the sort of conduct which caused the injury." *Id*. at 129-30. The Complaint refers only to unspecified "persons" who allegedly were "unqualified" and "not competent" to "engage in rigorous and defensible scientific research" or to "render valid and defensible opinions." (Compl. ¶¶ 132, 140.) The Complaint neither identifies when the NFL purportedly hired any members of the MTBI Committee nor any particular information known or knowable to the NFL at the time the purported employees were hired that would show a propensity for the sort of conduct that caused DeCarlo's injury. These conclusory allegations are insufficient.[14]

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hiring) that the employer failed to investigate a prospective employee notwithstanding knowledge of facts that would lead a reasonably prudent person to investigate. *Bouchard* v. *N.Y. Archdiocese*, 719 F. Supp. 2d 255, 260 (S.D.N.Y. 2010) (claims applicable only insofar as the "employer cannot be held vicariously liable for its employee's torts [because they occur outside the scope of his employment]") (internal quotation marks omitted); *Dempsey* v. *Walso Bureau, Inc.*, 246 A.2d 418, 419-20 (Pa. 1968) (negligent hiring and retention can only apply where an employee has acted "outside the scope of his employment") (internal quotation marks omitted).

[14] *See Chagnon* v. *Tyson*, 11 A.D.3d 325, 326 (1st Dep't 2004) (affirming dismissal of negligent hiring cause of action "in the absence of allegations identifying the employees involved and showing that defendants knew or should have known of such employees' propensity for the sort of conduct that caused plaintiff's injuries"); *Povich*, 11 A.D.3d at 129-30 (same); *Shu Yuan Huang* v. *St. John's Evangelical Lutheran Church*, 129 A.D.3d 1053,

Third, as detailed above with respect to the fraud-based claims (*see supra* Section II.A), Plaintiff does not sufficiently allege that the purportedly negligent hiring and retention of MTBI Committee members decades *after* DeCarlo retired from the NFL proximately caused him harm and is belied by the fact that the Complaint alleges that DeCarlo in fact sought and received medical diagnosis and treatment for his brain injury by 1995. (Compl. ¶¶ 79, 134, 142.)[15]

Fourth, Plaintiff has not alleged that any employee was acting "outside the scope of employment." *Coville* v. *Ryder Truck Rental, Inc*., 30 A.D.3d 744, 745 (3d Dep't 2006) ("It is well-settled law that where an employee is acting within the scope of his or her employment, the employer is liable under the theory of respondeat superior and no claim may proceed against the employer for negligent hiring or retention") (internal quotation marks omitted); *see also Heller* v. *Patwil Homes, Inc*., 713 A.2d 105, 107 (Pa. Super. Ct. 1998). To the contrary, Plaintiff's causes of action are premised on allegations that the MTBI Committee carried out its study of concussions as the result of commissioned work funded by the NFL. (Compl. ¶¶ 52, 129, 136.) Even if the NFL were considered an employer on the basis of such indirect funding (and it cannot be), the purportedly negligent execution of commissioned work is not a cause of action for negligent hiring or retention.[16]

1054 (2d Dep't. 2015) (same); *see also Sabo* v. *Lifequest, Inc.*, 1996 WL 583169, at *4 (E.D. Pa. Oct. 8, 1996) (dismissing negligent retention claim where "[p]laintiff . . . failed to present a scintilla of evidence that, had defendants conducted a more thorough investigation, they would have discovered" the employee's alleged harmful propensity).

[15] *See*, *e.g*., *Estevez-Yalcin* v. *Children's Vill.*, 331 F. Supp. 2d 170, 177 (S.D.N.Y. 2004) (dismissing claims because "the injuries caused by [the employee] were not proximately caused by any negligent hiring, retention, or supervision"); *Young* v. *Temple Univ. Campus Safety Servs.*, 2015 WL 6503386, at *4 (E.D. Pa. Oct. 28, 2015) (dismissing claim because "[t]he [c]omplaint does not plead any facts that would establish. . . how the alleged breach caused [plaintiff's] injuries.").

[16] *Akinboyo* v. *MRM Worldwide*, No. 6522782010, 2011 WL 11074850, at *4 (N.Y. Sup. Ct. Aug. 9, 2011) (dismissing negligent hiring and retention causes of action because "there is no

For these reasons, Plaintiff's negligent hiring and retention causes of action cannot survive.

D. Plaintiff Fails to State a Cause of Action for Civil Conspiracy

Plaintiff's civil conspiracy cause of action against the NFL is equally deficient. Although state laws differ regarding the elements of conspiracy,[17] all require plaintiffs to plead the foundation of the cause of action: That two or more people agreed to do an unlawful act. *See 1766-68 Associates, LP* v. *City of New York*, 91 A.D.3d 519, 520 (1st Dep't 2012); *Grose* v. *Procter & Gamble Paper Prods*., 866 A.2d 437, 440-41 (Pa. Super. Ct. 2005). Moreover, "[a] bare conclusory allegation of conspiracy is usually held insufficient." *Blanco* v. *Polanco*, 115 A.D.3d 892, 896 (2d Dep't 2014) (internal quotation marks omitted).[18]

Plaintiff's only allegations regarding the NFL's purportedly conspiratorial conduct are that the NFL "actively and deliberately conspired with its member-clubs to conceal the information alleged in Count I from DeCarlo [and] . . . also conspired with MTBI Committee team-members to discount and reject the causal connection between multiple concussions

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allegation that defendants . . . were acting outside the scope of their employment"); *Marotta* v. *Palm Mgmt. Corp.*, 2009 WL 497568, at *4 (S.D.N.Y. Feb. 25, 2009) (same); *In re Am. Investors Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 2007 WL 2541216, at *29, 35 (E.D. Pa. Aug. 29, 2007) (same).

[17] Generally, to state a cause of action for civil conspiracy, a plaintiff must allege "a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose," an "overt act done in pursuance of the common purpose," and "actual legal damage," and must also show "[p]roof of malice." *Goldstein* v. *Phillip Morris, Inc.*, 854 A.2d 585, 590 (Pa. Super. Ct. 2004); *1766-68 Associates*, 937 N.Y.S.2d at 35.

[18] *See also Toomer* v. *Cellco P'ship*, 2012 WL 2953831, at *8 (S.D.N.Y. July 20, 2012) (holding "a complaint must allege 'specific times, facts, and circumstances of the alleged conspiracy'") (internal quotation marks omitted); *Thompson* v. *Ross*, 2010 WL 3896533, at *7 (W.D. Pa. Sept. 30, 2010) (Plaintiffs "who allege civil conspiracy must plead some fact, such as meetings, conferences, telephone calls or joint signatures on relevant forms, or allege facts inferring conspiratorial conduct.") (internal quotation marks omitted).

suffered while playing in the NFL, a non-scientific return-to-play policy for players suffering concussions, and the chronic long-term effects of these injuries." (Compl. ¶ 100.) These bare allegations are devoid of any concrete information regarding the alleged conspiracy. Plaintiff has offered not a shred of factual support—no "specific times, facts, and circumstances"—demonstrating who at the NFL, or its member clubs or the MTBI Committee, orchestrated this purported conspiracy, let alone "any facts indicating the what, when, where, and how" they achieved it. *DDR Constr. Servs., Inc*. v. *Siemens Indus., Inc*., 770 F. Supp. 2d 627, 559-60 (S.D.N.Y. 2011) (dismissing civil conspiracy claim because it "utterly lacks factual detail").[19]

Moreover, many states—including New York and Pennsylvania—require plaintiffs to plead malice, *i.e.*, a "specific intent to cause injury," as an essential element of conspiracy. *Wegman* v. *Dairylea Co-op., Inc.*, 50 A.D.2d 108, 114 (4th Dep't 1975); *see also Routsis* v. *Swanson*, 26 A.D.2d 67, 71 (1st Dep't 1966); *Grose*, 866 A.2d at 440. To support a valid cause of action for civil conspiracy, plaintiffs must allege that the "*sole* purpose of the acts" was to injure the plaintiffs. *Operative Plasterers' & Cement Masons' Int'l Ass'n* v. *Metro. N.Y. Dry Wall Contractors Ass'n, Inc.*, 543 F. Supp. 301, 313 (E.D.N.Y. 1982) (emphasis added) (dismissing claim for conspiracy where it was "clear the sole purpose of the acts was not to injure plaintiffs"); *Zafarana* v. *Pfizer Inc.*, 724 F. Supp. 2d 545, 559 (E.D. Pa. 2010) (same). Plaintiff does not do so here. Instead, Plaintiff is silent on any motivation for the purported conspiracy, thereby failing to meet the pleading requirements under New York or Pennsylvania law. (*See* Compl. ¶¶ 99-102.)

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[19] *See also Faulkner* v. *City of Yonkers*, 105 A.D.3d 899, 901 (2d Dep't 2013) (noting "[a] bare conclusory allegation of [civil] conspiracy is usually held insufficient") (internal quotation marks omitted); *Thompson*, 2010 WL 3896533, at *7 (holding "threadbare conspiracy cause of action with no factual corroboration" concerning "meetings, conferences, telephone calls or joint signatures" should be dismissed); *Feingold* v. *Hendrzak*, 15 A.3d 937, 942 (Pa. Super. Ct. 2011) (same).

In addition, conspiracy under New York and Pennsylvania law is not independently actionable; liability depends on the performance of a separate, intentional tort. *See* 16 Am. Jur. 2d *Conspiracy* § 64 (2015). Plaintiff here premises the conspiracy cause of action on fraudulent concealment, but as discussed above (*see supra* Section II.A), that cause of action is also insufficiently pled. Accordingly, Plaintiff's conspiracy cause of action should be dismissed, for numerous reasons.[20]

E. Plaintiff's Cause of Action for Wrongful Death/Survival Should Be Dismissed Because All Other Causes of Action Are Untimely

Plaintiff's cause of action for wrongful death/survival action damages (Count VII) cannot stand independently and should be dismissed under both New York and Pennsylvania law, which require a valid existing cause of action at the time of the decedent's death. Indeed, "[i]t is a condition precedent to wrongful death and survival actions that the decedent's claim must have been viable at the time of death." *Corcoran* v. *N.Y. Power Auth*., 202 F.3d 530, 541 (2d Cir. 1999) ("because all Mr. Corcoran's claims were barred by his failure to file a timely notice of claim, Ms. Corcoran's wrongful death and survival actions are similarly barred.").[21] Because, as discussed above, none of Plaintiff's other causes of action were timely at DeCarlo's death, Plaintiff's cause of action for wrongful death/survival action damages should also be dismissed.

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[20] *See Abacus Fed. Sav. Bank* v. *Lim*, 75 A.D.3d 472, 474 (1st Dep't 2010) ("New York does not recognize an independent cause of action for conspiracy to commit a civil tort); *see also Goldstein*, 854 A.2d at 590 (dismissing conspiracy cause of action for failure to plead "any separate underlying intentional or criminal act").

[21] *See Sunderland* v. *R.A. Barlow Homebuilders*, 791 A.2d 384, 390 (Pa. Super. Ct. 2002), *aff'd*, 838 A.2d 662 (Pa. 2003) ("[I]f at the time of death a negligence action, based on the injuries that led to the death, would have been time barred, the wrongful death action is also time barred."); *Braun* v. *Lewis*, 99 A.D.3d 574, 575 (1st Dep't 2012) (same); *Deleski* v. *Raymark Indus., Inc.*, 819 F.2d 377, 380 (3d Cir. 1987) (survival claim time-barred because there was no valid cause of action at the time of decedent's death).

CONCLUSION

For the foregoing reasons, the NFL respectfully submits that the Complaint should be dismissed with prejudice.

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Respectfully submitted,

By: /s/ Brad S. Karp

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
Brad S. Karp
Bruce Birenboim
Lynn B. Bayard
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Attorneys for Defendant National Football League